United Nations **AT**

Administrative Tribunal

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20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 905

Case No. 990: EL-FAR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 6 August 1997, Rawhi Abdulla El-Far, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 5 October 1997, the Applicant, after making the necessary corrections, again filed an application, requesting the Tribunal:

"[1.] [To] cancel the Commissioner-General's decision dated 1 June 1997 ...

[2.] To ... promote me from grade 8 to grade 10 retroactively [to] 13.3.1967.

[3.] To ... promote me to grade 11 [retroactively to] 1971.

[4.] To ... promote me to grade 12 since my appointment as a Senior Academic Instructor in 1983."

Whereas the Respondent filed his answer on 27 April 1998;

Whereas the Applicant filed written observations on 6 June 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 1 February 1958, on a temporary indefinite appointment as an area staff member in the capacity of Teacher IV, grade 4, at Jerusalem Boys School. He was promoted to grades 5, 6 and 7 on 1 November 1959, 1 September 1961, and 1 September 1964. With effect from 1 March 1967, he was promoted to grade 8, based on satisfactory completion of the two-year in-service teacher-training course. On 13 March 1967, he was transferred to the Vocational Training Centre, Wadi Seer as VT Instructor (Academic). On 1 April 1970, he was granted a service promotion to grade 9, and with effect from 1 September 1972, he was promoted to grade 10.

On 4 December 1990, the Field Education Officer, Jordan, wrote to the Director of Education, UNRWA Headquarters, Vienna, recommending that the Applicant be promoted to a higher grade in view of his academic and professional qualifications and as all qualified academic instructors at UNRWA's Training Centres had been promoted to grade 12. On 4 January 1991, the Acting Director of Education advised the Deputy Director of Personnel that he had examined the Applicant's case thoroughly and recommended that he be promoted to grade 11. He added:

> "Consideration may be given, in the future, for promoting him to grade 12, subject to a favourable decision of the Ministry of Higher Education, Jordan, on the equivalency of the P[Professional]/Courses to BA degree for licensing purposes ..."

On 7 March 1991, the Acting Director of Personnel wrote to the Director of Education, approving the Applicant's promotion to grade 11 on an equivalency basis, with effect from 1 March 1991.

On 2 May 1994, the Principal of the Wadi Seer Training Centre recommended to the Chief, Field Education Programme (C/FEP), that the Applicant be promoted to grade 12 because his qualifications "can be evaluated as equivalent to University level since they are exceeding four years of in-service training." On 8 May 1994, the C/FEP, Jordan, wrote to the Director of Education in Amman, recommending that the Applicant be promoted to grade 12 based on the Applicant's "wide experience in teaching English and the various professional in-service training courses", as well as his "loyalty, total commitment and full dedication to the profession." In turn, on 29 May 1994, the Director of Education in Amman wrote to the Director of Administration and Human Resources at Headquarters, Vienna, to the same effect.

On 13 June 1994, the Officer-in-Charge, Education Department, reported to the Chief, Personnel Services Division, that "no favourable decision was made on the equivalency of the Institute of Education courses, including the [professional courses], to BA degree for licensing purposes by the Ministry of Higher Education, Jordan." On 29 June 1994, the Chief, Personnel Services Division, notified the Director of Education that, in view of this information, the Applicant could not be promoted to grade 12, on an equivalency basis, and that the Applicant was not yet qualified for such promotion under the Occupation Classification Manual.

On 13 June 1996, the Principal of the Wadi Seer Training Centre again recommended to the C/FEP, that the Applicant be promoted to grade 12 in view of his long experience and other qualifications. On 1 August 1996, the C/FEP, wrote to the Officer-in-Charge, Administration Department, Jordan, supporting the recommendation of the Principal of the Wadi Seer Training Centre.

On 14 August 1996, the Field Personnel Officer (FPO) and Deputy Field Administration Officer (DFAO), Jordan, advised the C/FEP, that "there [was] no change in circumstances from the previous ruling from [Headquarters] in July 1994 that would necessitate re-raising the [Applicant's] case" to Headquarters.

On 20 September 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the Agency's failure to promote him to grade 12.

On 10 October 1996, the Applicant wrote to the Deputy Director of UNRWA Affairs, Jordan, contesting the decision of 13 August 1996 not to raise the case again with Headquarters. On 22 October 1996, the Officer-in-Charge of UNRWA Operations informed the Applicant, "as you have already appealed to the Area Staff Joint Appeals Board, your case is left for recommendation by the Appeals Board, as the matter is now sub judice."

The JAB adopted its report on 2 April 1997. Its evaluation and recommendation read, in part, as follows:

"**III. EVALUATION ...**

...

(d) The Board noted that when the Appellant was promoted to grade 11, the requirements for Academic Instructors and Trade Instructors as set out in the Occupation Classification Manual [OCM] were not followed, and instead he was promoted to grade 11 on equivalency basis and that he has been working as an English Teacher since 1968 and as a Senior Academic Instructor since 1983.

Moreover, the Board is of the opinion that promoting the Appellant to the grade 11 without consideration for the OCM, constituted a precedent.

Furthermore, the Appellant worked for six years in grade 11, and in all he has served the Agency for 40 years.

In this context, the Board believes that since the Appellant has served the Agency for 40 years and since he was promoted to grade 11 without consideration for the requirements of the OCM therefore the Appellant deserves to be promoted to grade 12.

IV. RECOMMENDATION

17. In view of the foregoing and without prejudice to any further oral or written submission ..., the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed."

On 1 June 1997, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. Notwithstanding that you did not seek the review of the administrative decision prior to appealing, as required by the Rules, and that your appeal was manifestly out of time, the Board dealt only with the merits of the case. The Board noted that you had been promoted from grade 10 to grade 11 in 1991, which promotion, the Board believed, was not in accordance with the OCM. This, the Board opined, was a precedent to disregard the OCM's explicit requirements regarding the qualifications for your post. As a result, and taking into account your service with the Agency, the Board was of the opinion that you deserved to be promoted to grade 12 and therefore recommended that the administrative decision be reviewed accordingly.

I am unable to accept the Board's findings on the merits. The full grade of your post is grade 12. As you do not have the full qualifications for the post as set out in the OCM, you are not entitled to that grade. However, based on your qualifications, the Administration may award you a commensurate lower Grade. This occurred when you were promoted to grade 11 in 1991. Although you have no entitlement to the full grade of [t]his post, the Administration also [has] a discretion to award you that grade should it accept your qualifications as equivalent to the OCM requirement. It has not done so, and in the absence of a finding by the Board that this discretion was exercised improperly, I reject the conclusions of the Board on this issue. Furthermore, an appeal against an administrative decision is not receivable by the Board unless a staff member has first sought the review of the decision in accordance with the Rules. Unlike non-adherence to time limits, the Board cannot waive this mandatory procedural requirement. You did not seek the review of the administrative decision and on that ground too, I dismiss your appeal. Further, the Board did not explicitly address the issue of the lateness of the appeal, namely whether exceptional circumstances existed which justified the appeal, brought in 1996 against a decision made in 1994, being heard at all. Accordingly, I reject the Board's conclusions and recommendations and I must dismiss your appeal."

On 5 October 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's qualifications are equivalent to those required for promotion to the full grade of his post, and thus he is entitled to such a promotion, with retroactive effect to 1983.

2. The Applicant is entitled to retroactive effect of his prior promotions to grades 10 and 11.

3. The Applicant's appeal is receivable, as he properly sought review of a decision contained in a letter dated 14 August 1996. In that letter, the DFAO denied a request to raise the matter of the Applicant's promotion with Headquarters.

4. Exceptional circumstances justified accepting the Applicant's appeal.

Whereas the Respondent's principal contentions are:

1. The application is not receivable because the Applicant did not request administrative review of the contested decision prior to his appeal to the JAB.

2. The Applicant's appeal to the JAB was time-barred.

3. The Applicant's pleas seeking retroactive effect of his promotions to grades 10 and 11 are not receivable by the Tribunal, as he did not raise the issue before the JAB.

4. The Applicant is not entitled to a promotion to grade 12, and the Respondent properly exercised his discretion in this matter.

The Tribunal, having deliberated from 4 to 20 November 1998, now pronounces the following judgement:

I. The case arises from the failure of the Respondent to promote the Applicant to grade 12 post. The Respondent first proffers the arguments that the Applicant did not seek administrative review of the decision not to promote him before he took an appeal to the JAB and also that the appeal to the JAB was time-barred.

II. The JAB did not address these two issues, both of which had been raised by the Respondent. Instead, the JAB made a recommendation in the Applicant's favour, which was rejected by the Respondent.

III. In regard to the first issue, administrative review is a very important internal procedure. It gives the Administration an opportunity to redress a grievance before it is taken any further. As was stated by the League of Nations Tribunal, the tribunal of the predecessor organization to the UN, this procedure "seems to answer to a legal necessity inasmuch as while reconciling the interests of the officials with those of the Administration, it gives the latter an opportunity of verifying the facts alleged to be the cause of the damage to be made good." (Perrasse, League of Nations Administrative Tribunal, Judgement No. 14 (1935)). It is quite clear that the number of cases in which there are grievances and which are submitted for administrative review by the Secretary-General is greater than the number of those that reach the JAB or even the Tribunal. This proves the importance of administrative review in dissipating dissatisfaction and settling grievances. It is of the utmost importance that the Administration be given this opportunity, not only because it could result in avoidance of complicated and extended litigation but because it is only fair that the Administration be given the opportunity to reconsider and re-evaluate its decision before that decision is litigated. This is also the manner in which the process of settling grievances is generally structured in international administrative law. Administrative review under the UNRWA Area Staff Rules is not a mere embellishment or option. It is an integral part of internal procedures and the rules require that it be exhausted. The Staff

Rules make administrative review an obligatory internal procedure, and not an optional one nor one that can be waived, except by the Respondent.

IV. That having been said, the Tribunal finds, based on the particular facts in this case, that the JAB's decision to receive the appeal was justified. As explained below, the Respondent made certain representations to the Applicant that preclude the Respondent from maintaining that the Applicant failed to request administrative review.

On 1 August 1996, the Chief, Field Education Programme (C/FEP), wrote to the Officer-in-Charge, Administration Department, to present the Applicant's qualifications, which, in the C/FEP's view, made the Applicant eligible for promotion on an equivalency basis. This included an additional two years' teaching experience since the last request had been made to promote the Applicant on an equivalency basis. However, on 14 August 1996, the Field Personnel Officer (FPO) and the Deputy Field Administration Officer (DFAO) communicated to the C/FEP the decision that "there is no change in circumstances from the previous ruling from [Headquarters] in July 1994 that would necessitate re-raising the case of the [Applicant] to Headquarters."

On 20 September 1996, the Applicant lodged an appeal with the JAB against the decision not to recognize his qualifications for promotion to grade 12. Approximately three weeks *after* lodging his appeal, on 10 October 1996, the Applicant wrote to the Deputy Director of UNRWA Affairs, seeking administrative review. In that letter, the Applicant asserted that "[t]here is a certain change in my academic and professional qualifications that require reconsideration of my position accordingly" and asked that his case be raised with the Director of Education for reconsideration.

On the copy of the 10 October request for review included in the Applicant's official status file, the Deputy Director of UNRWA Affairs wrote two notes. The first note, written on 14 October 1996, instructs, "D/FAO + FPO[:] please handle with care -- this could lead to an appeal." The second note, written on 16 October 1996, confirms a

prior discussion with the DFAO and FPO as follows: "D/FAO + FPO[:] we discussed -- on the understanding he has already appealed to the ASJAB [Area Staff Joint Appeals Board], please reply that we must leave his case for recommendation by the appeals [sic], as the matter is now sub judice." Consequently, on 22 October 1996, the Officer-in-Charge, UNRWA Operations, informed the Applicant:

> "Now as you have already appealed to the Area Staff Joint Appeals Board, your case is left for recommendation by the Appeals Board, as the matter is now sub judice."

The Tribunal is of the view that the response to the Applicant's 10 October request for review exhibited a certain degree of bad faith. The Deputy Director of UNRWA Affairs responded in this manner after discussions with the very officer who had communicated the decision being appealed against. The Respondent should not have refused to conduct an administrative review when the Applicant sought such review. Rather, he should have advised the Applicant that his appeal before the JAB could not proceed until such review had been conducted. Had the Respondent so advised the Applicant, he would have had the opportunity to withdraw his appeal so that the review and appeals process could proceed in the proper order. More importantly, the Respondent might have had the opportunity to resolve this matter at that time, without the need for an appeals process. The 22 October letter suggests that the Respondent was waiving his right to conduct an administrative review and that he would, instead, leave the matter for the JAB to make a recommendation. The Tribunal finds that the Respondent is estopped from arguing that the appeal was not receivable based on the Applicant's purported failure to seek administrative review.

V. The Respondent argues that the claim was time-barred because the Applicant waited until 1996 to appeal a July 1994 decision not to promote him to grade 12. The

Respondent claims that the decision communicated to the C/FEP in the 14 August 1996 memorandum merely served to confirm the July 1994 decision. The Tribunal finds that the requests for promotion that the Applicant's supervisors presented to the Respondent in 1996 differed from those presented in 1994, in that the Applicant had two additional years of experience that might have warranted a reconsideration of the 1994 decision. Therefore, the decision against which the Applicant lodged an appeal is properly considered to be the one dated 14 August 1996. The area staff rules require a staff member to seek review of an administrative decision within one month of the contested decision. The Applicant thus might be considered to have acted either a few days late, if the 20 September 1996 initiation of an appeal provides the critical date, or 3-1/2 weeks late, if the 10 October 1996 request for review provides such date. However, since the FPO and DFAO appear not to have apprised the Applicant directly of the decision that had been made, but rather addressed the 14 August memorandum only to the C/FEP, the Tribunal finds that exceptional circumstances justified the Applicant's short delay in pursuing internal remedies to challenge that decision and warranted the JAB's waiver of the time-limit with respect to his seeking administrative review.

VI. As the application is receivable, the Tribunal must now examine the merits of the case. The relevant facts are as follows:

In 1994, the Applicant was recommended for promotion to grade 12. On 29 June 1994, the Chief, Personnel Services Division, notified the Applicant's department that the Applicant could not be promoted to grade 12 "on equivalency basis" and that under the Occupation Classification Manual he was not yet qualified for such a promotion. The decision was taken on the basis of a report from the Applicant's department that "no favourable decision was made on the equivalency of the Institute of Education courses, including the [professional courses], to BA degree for licensing purposes by the Ministry of Higher Education, Jordan." The Applicant's department had advised earlier that promotion

was subject to a favourable decision of the Ministry of Higher Education, Jordan, on the equivalency of the professional courses to a BA degree for licensing purposes.

On 13 June 1996, the Principal of the Wadi Seer Training Centre again recommended that the Applicant be promoted to grade 12. The C/FEP supported that recommendation. On 14 August 1996, the DFAO, Jordan, advised the C/FEP, that "there [was] no change in circumstances from the previous ruling from [Headquarters] in July 1994 that would necessitate re-raising the [Applicant's] case" to Headquarters.

VII. As the Tribunal has held, a staff member has no right to promotion in the absence of a specific legal obligation creating a corresponding right to promotion (cf. Judgement No. 275, Vassiliou (1981)). The administrative authority has a discretion in regard to promotion (cf. Judgements No. 275, Vassiliou, No. 375, Elle (1986) and No. 390, Walter (1987)). However, this discretion is not an absolute one and must be exercised without abuse so that the staff member is accorded fair treatment. The Tribunal has taken the view that failure to take relevant facts into consideration in the promotion process can amount to an irregularity for which compensation is due. (Cf. Judgements No. 312, Roberts (1983), No. 314, Tomiak (1983)).

VIII. The issue raised is whether the decision not to reconsider the Applicant for promotion in 1996, after he had been refused promotion in 1994, was properly taken.

The Tribunal notes particularly that the Applicant had two years more experience between 1994 and 1996 and that both of his supervisors had recommended promotion in view of his long experience and other qualifications. As a result, in the Tribunal's view, the decision not to promote the Applicant in 1994 was open to reassessment in 1996. The decision taken in 1996 not to raise his case with Headquarters for reconsideration for promotion was in error because it failed to take into account facts that had become relevant after the decision taken in 1994 not to promote him. The Tribunal concludes that, as a

result of this substantive error, the Applicant was denied fair and equitable treatment in regard to his request for promotion to grade 12, even though there was no certainty that he would have been promoted. For this irregularity, the Applicant must be compensated. The Tribunal also recommends that the Applicant be considered for promotion to the grade 12 level, as soon as possible.

IX. For the above reasons, the Tribunal:

(i) Decides that the application is receivable;

(ii) Orders the Respondent to pay to the Applicant compensation in an amount equivalent to three months net base salary at the rate in effect on the date of this judgement; and

(iii) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
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AT/DEC/906
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 906

Case No. 992: ZIADEH

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 24 July 1997, Samih Ziadeh, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 2 November 1997, the Applicant, after making the necessary corrections, again filed an application, requesting the Tribunal:

"...

2. [To order] the reinstatement of [the Applicant's] previous post with UNRWA.

3. To consider the period from 9.3.1996 to date as leave with full pay.

4. [To award] compensation for moral and psychological distress."

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Whereas, on 19 January 1998, the Executive Secretary of the Tribunal informed the Applicant that it is up to the Applicant to state the amount of compensation that he is requesting;

Whereas, on 28 February 1998, the Applicant submitted an additional document expanding on his plea for compensation, in part, as follows:

> "... If I had continued work with the Agency until retirement on age ground (year 2012), this means that 14 years of work have been lost the total then will be $205.128.
>
> ... my health insurance was terminated which is now costing me about JD500 ($700/month = $8,400/year) ..."

Whereas the Respondent filed his answer on 30 June 1998;

Whereas, on 6 November 1998, the Tribunal put questions to the Respondent, to which he provided answers on 11 November 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 1 October 1983, as Medical Officer "B" (Part Time), at grade 14, in the Jarash Camp Health Centre. On 1 January 1986, the Applicant was granted a temporary indefinite appointment as an area staff member in the capacity of Medical Officer "B" (Relieving) at grade 14, in the Jordan Field. On 1 October 1986, he was transferred to the post of Medical Officer "B", in the Baqa'a Camp Clinic, Balqa Area. He was subsequently transferred to a number of other offices in the region. The Applicant separated from service on health grounds with effect from 5 March 1996.

On 22 July 1992, the Applicant underwent a kidney transplant operation. On 27 August 1992, a medical board convened to examine the Applicant and determine his fitness for continued service with the Agency. On 11 November 1992, the medical board concluded that the Applicant was "fit for continued service with the Agency", and

recommended "re-evaluation after three months". During the period between 4 February 1993 and 16 January 1995, five other medical boards re-evaluated the Applicant. Each medical board concluded that the Applicant remained fit for continued service with the Agency; each medical board recommended re-evaluation of the Applicant's condition after six months.

On 19 July 1995, the Applicant was examined by another medical board, which concluded on 19 September 1995, that the Applicant was fit to resume his duties with the Agency. The medical board recommended re-evaluation after one year. It further noted in an attached confidential letter to the Chief, Field Health Program, Jordan, as follows:

> "The present post of [the Applicant] ... requires continued mobility and travel within the Area throughout the scholastic year.
>
> Although [the Applicant] was declared fit by the Board, [the Applicant] was found to suffer from avascular necrosis of the head of the femur, both sides, which renders him more vulnerable to fracture.
>
> Therefore, in order to avoid the probability of in-service accidents that might result from mobility and travel, the Board recommends that [the Applicant] be stationed in a Health Centre."

On 28 September 1995, the same Medical Board was re-convened and "re-reviewed the reports and investigations concerning [the Applicant]." On 1 October 1995, the Medical Board submitted to the Chief, Field Health Program, Jordan, its conclusions that "[the Applicant was] UNFIT to resume his duties with the Agency" and that "[t]he provisions of para. 7 of staff rule 109.7 do not apply in his case." On 2 October 1995, the Field Health Officer concurred with these conclusions.

On 23 October 1995, the Applicant requested the Director of UNRWA Affairs and the Director of Health to review the decisions to declare him unfit for continued service and to terminate his appointment. The Applicant enclosed medical reports from specialists in support of his claim that he was fit for service.

On 30 October 1995, the Director of Health informed the Applicant that he had reviewed the Applicant's file and was "confident that the decision taken based on the recommendation of the Medical Board which examined you on 1 October 1995 was sound and in your best interest." The Director of Health noted in particular that the Applicant was receiving immuno-suppressive treatment following his kidney transplant surgery and that the Applicant had developed a vascular necrosis of the head of the femur. The Director of Health concluded that the Applicant would be vulnerable to fractures and to contracting infections during the performance of his duties.

On 2 November 1995, the Acting Director of UNRWA Affairs, Jordan, wrote to the Applicant, confirming that the Applicant's service with the Agency would be terminated "on medical grounds at the expiry of [his] accrued annual and sick leave entitlements, i.e. with effect from close of business on 5 March 1996." On 5 November 1995, the Applicant requested a review of that decision.

On 7 November 1995, the Acting Director of UNRWA Affairs, Jordan, informed the Applicant that, having thoroughly reviewed the case, he "found nothing to add to [his] letter ... dated 2 November 1995, i.e. [the Applicant's] services [would] be terminated on health grounds with effect from close of business on 5 March 1996, with payment of all [his] entitlements in due time."

On 22 November 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 31 March 1995. Its evaluation and recommendation read as follows:

"...

> (b) By reference to the Administration's reply, the Board noted that the decision to terminate the Appellant's services on health grounds was fully justified and was not motivated by prejudice or bias.
>
> (c) The Board here noted that there had been six medical boards that recommended that the Appellant was fit for work. Furthermore, the Board noted that the last medical board dated 19.9.1996, recommended that the

Appellant was fit to resume his duties with the Agency, and that he is recommended for re-evaluation after one year and was supported by the Deputy Chief, Field Health Programme, Jordan, on 25 September 1995.

(d) On 1 October 1996, another medical board was held to evaluate the Appellant's condition. The Board here believes that this Board did not complete the legal procedures for a new medical board i.e. the Chief, Field Health Programme, Jordan, did not issue a memorandum for a new board to be held nor did he justify the continuance of the last board after it submitted its recommendation. Also the Board noted that the report of the Board of 1 October 1996, was the same as the report for 19 September 1996, the only difference was the word **unfit**. (Did the Medical Board have the authority to re-review their conclusions at any time they found it suitable?)

In this context the Board is of the opinion that the Appellant was treated unfairly.

IV. RECOMMENDATION

17. In view of the foregoing and without prejudice to any further oral of written submission ..., the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed."

On 3 July 1997, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Board noted that the last Medical Board which examined you initially declared you fit for duty with the Agency and that [the] C/FHP [Chief, Field Health Programme] supported this conclusion. Further, it noted that later the same Medical Board, having already submitted its report, met again without being formally convened. It submitted an identical report to its initial report, except that the conclusion was different. The Joint Appeals Board was, as a result, of the opinion that you were treated unfairly and recommended that the administrative decision be reviewed. The Joint Appeals Board did not consider your claim that your illness was attributable to service.

On the primary claim, namely whether you were unfit for service, I agree that the procedures of the Medical Board appear to have gone awry; however, that does not mean that you have been treated unfairly. Your appeal concerns the

correctness of the opinion of the Medical Board as to your fitness for duty. I accept that the medical opinion is correct. In doing so, I have relied on a review of the Medical Board's reports by the previous and the current Directors of Health. Your employment with the Agency could expose you to occupational hazards due to the side effects of immuno-suppressive treatment. There is no other vacant post for which you are qualified. Accordingly, I do not accept the Board's recommendation and your appeal is dismissed.

In relation to your claim that your illness was attributable to service on behalf of the Agency, in the absence of any administrative decision to deny you compensation or review as required by the Rules, this aspect of your appeal was not receivable by the Joint Appeals Board. Further, you did not comply with the claims procedure in the Rules. Indeed, notwithstanding that your illness was contracted in 1992 at the latest, at no time until your appeal in November 1995 did you claim it to be attributable to service. Accordingly, notwithstanding that this issue was properly not considered by the Joint Appeals Board, I rejected your claim as to the Agency's responsibility for your medical condition.

..."

On 2 November 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent improperly rejected the JAB's recommendation, particularly since the Respondent has admitted that the Medical Board's procedures "appear[ed] to have gone awry".

2. The decision to terminate the Applicant on health grounds was improper because the Applicant was found not to be physically unfit but, rather, to be at risk of exposure to health hazards.

3. The Applicant is fit for service with the Agency, as his surgeon has confirmed that he can work without restrictions.

Whereas the Respondent's principal contentions are:

1. The Respondent has broad discretion to terminate the appointment of a staff member if such action would be in the interest of the Agency.

2. The Applicant has failed to show that the Respondent's decision was prompted by an improper motive.

3. The proceedings of the Medical Board were not unfair and there is no evidence that its change of opinion was motivated by any improper purpose.

4. The Respondent is entitled to determine the fitness of the Applicant for service based on the Medical Board's conclusions and recommendations.

5. The Applicant failed to quantify precisely his claim for compensation or to provide evidence of his present earnings for the purpose of mitigating damages, and therefore, he is not entitled to any compensation.

The Tribunal, having deliberated from 5 to 20 November 1998, now pronounces the following judgement:

I. Having carefully considered the pleadings and the documentation in this case, the Tribunal makes the following findings:

1. That between 27 August 1992 and 19 September 1995, the Applicant's health had been examined and reviewed by no less than six medical boards, all of which had concluded that he was fit to work in the medical service of UNRWA.

2. That on all such occasions, his fitness for service was determined by reference to his capacity to discharge his functions in an acceptable manner and that both the Applicant and the Respondent had considered this the primary consideration whereby his condition should be assessed.

3. That no new medical evidence became available to the Medical Board between the Report of the Medical Board dated 19 September 1995, when it reported the Applicant as being "fit to resume his duties", and the Report dated 28 September 1995, when the same Board had reconvened to review the Applicant's case and found him "unfit to resume his duties". The same information it previously considered served as the basis for the new conclusion. The Applicant experienced no substantial or relevant deterioration in his condition between those dates which would have entitled the Board to change its original conclusion from "fit to resume his duties" to "unfit to resume his duties".

4. That the reconvening of the same Medical Board and the reconsideration by it of the Applicant's fitness for service had been inspired by the Respondent. The Respondent rejected the Board's first conclusion *not* on the grounds that there was new evidence that the Applicant was unfit to resume his duties. Rather, the Respondent believed that the Applicant would be unable to discharge his duties because his medical condition made him susceptible to easily fracturing his femur, each of which was weakened by avascular necrosis, and because the immuno-suppressive medication that he needed to take made him vulnerable to developing an infection. Thus the Respondent feared that the Applicant might suffer a service-incurred injury or other service-related illness, which would expose the Respondent to adverse financial burdens and would constitute "an unnecessary and undesirable outcome".

5. That none of the specialists whom the Applicant consulted, including the two to whom the Applicant had been referred by the Agency, had concluded that he was unfit.

6. That between 19 September and 28 September 1995, the Applicant was never apprised of the reasons why his case was being reconsidered, i.e., the Applicant's potential exposure to a service-incurred injury or illness or the potential financial consequences to the Respondent. The Respondent appears to have changed the interpretation of "unfit for duty" without giving notice of such change in definition to the

Applicant, so as to deny him an opportunity to challenge the application of such definition to his case and to deny him the opportunity of adducing evidence or making presentations that he was not "unfit" within the widened definition.

II. Based on these findings, the Tribunal concludes that the Applicant was denied the right to participate in any meaningful way in the Medical Board's reconsideration of his fitness for service. He was denied his right to furnish evidence thereon or to challenge any evidence which may have been adverse to him. The Applicant was thus denied the rights protected by the principle of "audi alteram partem", being analogous to the right to confront one's accusers. In short, the Applicant was denied due process.

III. The Tribunal is further concerned as to the inadequate content of the report of the Medical Board dated 28 September 1995, in that it repeats verbatim the earlier report of 19 September 1995, when it declared him "fit to resume his duties". The only difference in the 28 September report is that the word "unfit" has been substituted for the word "fit". The Medical Board does not explain its reasons for such a "volte-face". It stated no ascertainable reasons for the change in its conclusion, so as to enable anyone to understand why such change was made. Since all of the medical evidence from the specialists was to the effect that he was fit, the Tribunal can only assume it found him"unfit" because of the new and expanded definition. Likewise, the Respondent's reasons for accepting the later conclusion, rather than the original conclusion that he was fit for duty, made by the very same Board, are difficult, if not impossible, to ascertain. The failure to detail such reasons severely disadvantages the Applicant in his ability to make representations and to adduce contrary evidence. The Tribunal is satisfied that due process requires that such a report be transparent and should state reasons so as to allow a dissatisfied staff member to challenge its contents. The Tribunal is satisfied that this general principle is applicable to all administrative decisions that are subject to review.

IV. The Tribunal is further concerned that the very persons who orchestrated or inspired the re-convening of the Medical Board were those who ultimately inspired the decision to separate the Applicant from service on the grounds that he was unfit for service. This situation might bring about the perception that bias or prejudice tainted the termination of the Applicant's appointment.

The Tribunal is also concerned that because the Applicant had not been apprised that his fitness or otherwise was now being judged under the new and expanded definition, he may have been denied the opportunity of seeking an agreement or compromise which might have been acceptable to both parties.

V. The Tribunal is satisfied that for the reasons stated, the Respondent deprived the Applicant of both fairness and due process in the procedures that eventually led to the Respondent's decision to separate the Applicant from service on the grounds of health. The Tribunal has considered the Applicant's request for reinstatement but considers this not to be an appropriate remedy. First, the Tribunal is not satisfied that had the procedures been correct and fairly conducted, the decision of the Medical Board and the Respondent's acceptance thereof would have been different. Second, the circumstances have obviously changed since the Applicant was separated. The Applicant has been in private medical practice since his separation, and substantial separation benefits have already been paid to the Applicant. The Tribunal therefore considers that the payment of compensation would be a more appropriate remedy than reinstatement.

VI. For the foregoing reasons, the Tribunal:

1. Orders that the Respondent pay to the Applicant compensation in the amount of two years net base salary at the rate in effect on the date of the Applicant's separation from service, and

2. Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/907
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 907

Case No. 993: SALVIA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Julio Barboza;

Whereas, on 20 November 1997, Elena Salvia, a former staff member of the United Nations Economic Commission for Latin America and the Caribbean (hereinafter referred to as ECLAC), filed an application requesting the Tribunal:

"A. To find that the Respondent's amendment of the 200 Series Staff Rules was made to avoid the payment of termination indemnity.

B. To find that in accordance with Article 101, paragraph 1 of the Charter and General Assembly resolutions 37/126, Section IV, paragraph 5, and 38/232, Section VI, paragraph 5, her fixed-term contract on long term status should be considered as an indefinite appointment or as a fixed-term appointment expiring at her age of retirement.

C. Should pleas [A and B] above not be accepted, to find that the Appellant had a reasonable expectancy for the renewal of her fixed-term appointment for at least two additional years.

...

E. To order the Respondent to pay an indemnity equivalent to two years of salary, based on the long period of continuous good services rendered to the Organization and the reasonable expectancy of contract renewal.

...

G. To order that the Respondent pay the Applicant an additional compensation equivalent to three months of her net salary, for delays in the consideration of her case."

Whereas the Respondent filed his answer on 25 June 1998;

Whereas the Applicant filed written observations on 25 August 1998;

Whereas, on 11 November 1998, the Tribunal put questions to the Applicant, to which she responded on 14 November 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 April 1975, on a two-month fixed-term appointment at the GS-5 level, under the 100 Series of the Staff Rules, as a Statistical Clerk with the Economic Commission for Latin America and the Caribbean (ECLAC), at its Buenos Aires Office. Her appointment was successively extended, and on 1 April 1976, the Applicant was promoted to the G-6 level, as Research Assistant. On 1 April 1981, she was promoted to the G-7 level, and her functional title was changed to Senior Research Assistant. On 1 May 1985, the Applicant was assigned to a 200 Series project as Expert at the L-2 level, although she maintained her 100 Series fixed-term appointment. On 1 January 1987, the Applicant was granted a long-term appointment under the 200 Series of the Staff Rules, as an Expert at the L-2 level. Thereafter, her contract was successively extended to 30 June 1995, when she was separated from service upon the expiration of her appointment.

In July 1993, the Applicant was assigned the functions of Chief of Administration, ECLAC, Buenos Aires Office, in addition to her regular functions in the computer area.

On 2 March 1994, the Director of ECLAC, Buenos Aires, wrote to the Applicant, informing her that due to budgetary difficulties in the ECLAC Buenos Aires Office, institutional reorganization would be necessary. As a result, certain "thematic" areas including the computer area, where the Applicant worked, would be eliminated. He noted that during two meetings he had had with the Applicant, one towards the end of January 1994, and another on 1 March 1994, he had offered her the position of Chief of Administration, ECLAC, Buenos Aires Office but that she had "emphatically" rejected the offer. He informed the Applicant that, under the circumstances, he would not request renewal of her contract, which was due to expire on 31 March 1994.

On 8 March 1994, the Director of ECLAC, Buenos Aires, announced to all ECLAC Buenos Aires staff members that another staff member had been asked to assume the coordination of the administrative functions of the Office.

On 11 March 1994, the Applicant wrote to the Director of ECLAC, Buenos Aires, stating: "I accept the offer to take up the post of Chief of Administration in the ECLAC, Buenos Aires Office." In a reply dated 14 March 1994, the Director of ECLAC, Buenos Aires, pointed out that the position of Chief of Administration had been assigned to another staff member, that this decision had been communicated to all personnel on 8 March 1994, and that the position had already been offered to and categorically rejected by the Applicant.

On 17 March 1994, the Director of ECLAC, Buenos Aires, informed the Applicant that her contract, due to expire on 31 March 1994, would be extended through 30 June 1994. He advised that, henceforth, her work would exclusively involve computer work. Subsequently, ECLAC successively renewed the Applicant's appointment through 30 June 1995.

On 17 May 1995, the Director of ECLAC, Buenos Aires, informed the Applicant that, based on the recommendations of the "Joint Advisory Group" concerning the financial and staffing situation of the Buenos Aires Office, it had been decided to discontinue the

computer functions performed by the Applicant, with effect from 1 July 1995. The Applicant was advised, therefore, that her contract would be renewed only through 30 June 1995.

On 1 June 1995, the Applicant requested the Executive Secretary, ECLAC, Santiago, to review the administrative decision not to renew her contract. In a reply dated 23 June 1995, the Executive Secretary, ECLAC, Santiago, informed the Applicant that, for purely financial reasons, ECLAC was unable to renew her contract beyond 30 June 1995.

On 5 July 1995, the Applicant requested the Secretary-General to review the administrative decision not to renew her appointment beyond 30 June 1995. The Applicant also requested the Secretary-General's agreement to submit her case directly to the Administrative Tribunal if the decision that she was contesting were to be maintained.

On 10 August 1995, the Chief, Administrative Review Unit, informed the Applicant that her request for review had been received at that office on 8 August 1998, and that if she did not receive an answer from the Secretary-General within two months, she could file an appeal with the Joint Appeals Board (JAB) within the following month.

On 8 November 1995, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 27 August 1997. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 50. ... [T]he Panel unanimously agreed that the Appellant should have claimed, under the General Assembly resolution 37/126, section IV, para. 5 and General Assembly resolution 38/232, section VI, para. 5, the right to a reasonable consideration for a career appointment following five years of continuous service with the Organization, before now.
>
> 51. The Panel unanimously determined as frivolous, the contention of the Appellant that she was not properly informed of the possibilities of obtaining a professional post via the G to P competitive examinations.

52. The Panel unanimously agreed that except for the mere allegations of the Appellant, there is no rational basis for the statement that staff rule 204.3(b) was abolished to avoid the payment of termination indemnity to the Appellant.

53. The Panel unanimously agreed that the Appellant had a legitimate expectation of continued employment with the Organization, and unanimously recommends, in view of this finding, that the Appellant be compensated and paid the equivalent of nine months of her net base salary.

54. The Panel unanimously agreed that there was unreasonable delay in processing the Appellant's appeal for which the Respondent is to blame, and unanimously recommends, in view [of] this finding, that the Appellant be compensated and paid the equivalent of an additional three months of her net base salary.

55. The Panel unanimously decided to make no further recommendation in support of the appeal."

Not having received the Secretary-General's decision on the JAB's recommendations, on 20 November 1997, the Applicant filed with the Tribunal the application referred to earlier.

On 18 December 1997, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has decided to accept the Board's conclusions that you could not base any right to a reasonable consideration for career appointment on General Assembly resolutions 37/126 and 38/232; that your contention that you were not properly informed of the possibilities of obtaining a professional post via the G to P examination was frivolous; and that there was no rational basis for your statement that staff rule 204.3(b) was abolished to avoid the payment of termination indemnity to you.

The Secretary-General, however, is unable to accept the Board's conclusion that you had a legitimate expectation of continued employment with the Organization since he does not share the Board's reasoning which led to this conclusion. The fact that you were assigned the functions of Chief of Administration in June 1993 and were offered the post itself in January and on

1 March 1994 clearly demonstrated the good faith of the Administration in terms of designating you *on those specific functions,* if you accepted the offer. It was obviously the Administration's prerogative, at a time of budgetary difficulties, to decide which functions had to be maintained and which had to be discontinued and the offer was made to you within that framework. Given the fact the Administration had demonstrated its good will and good faith, as mentioned before, to assign you to *the administrative functions*, it would be unreasonable to suggest that the Director capriciously interpreted your response on 1 March 1994 to be a negative one and that he, again capriciously, wrote so in a memo to you the next day. It is clear that you could not have a legitimate expectancy to continue on functions you would have preferred instead of functions you had been offered. Even if there was any confusion as to what was meant in the information circular of 8 March 1994 by the phrase 'coordination of the administrative functions' the fact that on the same day you were asked to hand over the administrative tasks you had been carrying out to the other staff member who had been designated by the Director, dispels any doubt (...). Thus your acceptance of the post of Chief of Administration on 11 March 1994 was moot and does not constitute a basis of a legitimate expectancy of renewal of appointment either. In conclusion, there were no circumstances created by actions of the Administration which may have created such a legitimate expectancy of renewal.

The Secretary-General does not agree with the Board's conclusion that the Respondent was to blame for an 'unreasonable delay' in processing your appeal. As Respondent had explained, Respondent's office was actively engaged in obtaining all the information necessary to complete Respondent's reply and thus the delay was not unconscionable.

For the above-mentioned reasons, the Secretary-General has decided not to accept the Board's recommendations for compensation and has consequently decided to take no further action in your case.

..."

Whereas the Applicant's principal contentions are:

1. The Respondent amended the 200 Series of the Staff Rules in order to avoid paying termination indemnities, in violation of Article 101, paragraph 1 of the Charter and General Assembly resolution 37/126, Section IV, paragraph 5.

2. The Applicant had a reasonable expectation of renewal of her contract.

3. The Applicant should be compensated for the dilatory manner in which the Respondent handled her appeal.

Whereas the Respondent's principal contentions are:

1. The Applicant was on a fixed-term appointment under the 200 Series of the Staff Rules, which expires on the date stated in the letter of appointment. Longstanding service by itself does not create any expectancy of renewal.

2. Appointments under the 200 Series of the Staff Rules are by their very nature limited both in scope and duration.

3. A series of successive fixed-term appointments does not by itself create a legal expectancy of renewal.

4. Actions or statements made by the Administration did not constitute a commitment on the part of the Organization.

5. Although the Respondent concedes that the handling of the Applicant's appeal did not conform with the time-limit stated by staff rule 111.2(g), compensation of one month net base salary would be adequate.

6. The Applicant's claim that the Respondent amended the 200 Series of the staff rules to avoid paying a termination indemnity has no rational basis.

The Tribunal, having deliberated from 9 to 20 November 1998, now pronounces the following judgement:

I. The Applicant held an appointment under the 200 Series of the staff rules. After a series of renewed contracts, her post was abolished. Even if the post had not been abolished, the Applicant could sustain no expectations of renewal of her last contract, since

the relationship between the Organization and a staff member ceases at the expiration of such an appointment. The Applicant had been warned that the computer area would eventually be eliminated and that her contract would not be renewed after 30 June 1995.

II. The Tribunal considers that that was the end of the relationship regarding the 200 Series post, and that no compensation is due in that respect. The Tribunal has repeatedly held that no legal expectancy of continued employment is created by efficient or even outstanding performance (cf. Judgement No.700, Benthin (1995)), or by a series of successive appointments (cf. Judgement No. 422, Sawney (1988)).

III. However, the Applicant had been given functions of Chief of Administration together with her 200 Series post. That overlapping of functions extended between July 1993 and the appointment of a new Chief of Administration on 8 March 1994, i.e., approximately eight months. Moreover, she had been offered that post in the context of a restructuring of the office contemplated by the Director, ECLAC/Buenos Aires (the "Director"). The Tribunal believes that in that respect, the Applicant had a legitimate expectancy of a post, but not of retaining her post under the 200 Series.

IV. In order to better understand the facts of the case and their legal implications, the Tribunal shall examine the period between the meeting that the Director and the Applicant had during the last week of January 1994 and the appointment of another staff member as Chief of Administration on 8 March of the same year.

V. The evidence before the Tribunal regarding the aforementioned period consisted of: (1) a letter from the Director to the Applicant, dated 2 March 1994; (2) a memorandum dated 8 March 1994, announcing that another staff member had been asked to take charge of the coordination of the administrative tasks of the office; (3) a memorandum of

11 March 1994, from the Applicant to the Director, stating that she accepted the offered post of Chief of Administration, ECLAC/Buenos Aires office; (4) a memorandum from the Director to the Applicant, dated 14 March 1994, rejecting the terms of the Applicant's 11 March 1994 memorandum; and (5) a memorandum from the Director to the Applicant of 17 March 1994.

VI. In response to questions put by the Tribunal, the Applicant provided a letter dated 8 March 1994, that she wrote to the Director. This letter was immediately transmitted by the Tribunal to the Respondent and, in the absence of a challenge by the latter, has been accepted by the Tribunal as valid evidence. This letter is important and sheds light on the meaning of the Director's and the Applicant's conduct in that critical period between late January and 8 March 1994.

VII. According to the record, the Director and the Applicant held a meeting during the last week of January, during which the Director told the Applicant that he intended to restructure the office. In his scheme, the Applicant was offered the post of Chief of Administration, the functions of which she had been assuming for several months. She was thus asked to abandon her work in her post in the computer area, the post that she occupied under her 200 Series appointment. The Director and the Applicant agreed to revisit these issues, which remained unresolved, after the vacation period.

VIII. On 1 March 1994, a second meeting took place. The Applicant and the Respondent have set forth different versions of what transpired during that meeting. The Respondent's version, embodied in the Director's letter of 2 March, is that the Applicant emphatically manifested her rejection of the administrative tasks and her preference to continue her professional work in the computer field. Finally, the letter says that, in that last analysis ("en definitiva", in Spanish), she had neither accepted the post of Chief of

Administration nor considered it reasonable to continue working both in the computer and administrative fields without any additional financial benefit. The Organization, the Director added, was in no condition to grant such additional benefit to her.

IX. The Applicant, on the other hand, maintains in her application that she "accepted the proposal, but strongly suggested the merger of the computer area with that of administration, requesting also a change in her functional title to reflect the new responsibilities of the post." The Applicant continues, "The Director interpreted this suggestion as a negative answer from the Appellant to accept the post as Chief of Administration, and also interpreted the proposal of the functional title change as a request for a salary increase, in the own words of the Director. The Appellant emphatically rejects that interpretation and declares that such was not her intention."

X. According to the Director, the matter was closed in the 1 March meeting when the Applicant rejected the post of Chief of Administration, whereas in the Applicant's version, the offer was still open.

XI. Be that as it may, the letter of 8 March from the Applicant to the Director, recently introduced by the Applicant, made clear to the Director that her understanding was different from his. The Applicant maintains that this letter was received by the Director before he issued his circular assigning the coordination of the administrative job of the office to another staff member, and that the circular was issued as a result of the Applicant's letter.

XII. Such being the case, the Tribunal finds that the Respondent should have reopened negotiations. The Applicant's letter of 11 March, simply accepting the post of Chief of

Administration, also sheds light on the real intention of the Applicant, which was to continue her relationship with the Organization.

XIII. The fact that the Respondent abruptly ended the discussions, in an effort to impose his own interpretation of the Applicant's reaction to the offer, implies a total lack of consideration for the Applicant and an attempt to evade the Administration's responsibility towards her. It was obvious that she had a legitimate expectancy to obtain a post for the tasks that she was entirely capable of performing, as shown by the fact that after six months of work in that post, she was offered the position.

XIV. The Applicant accuses the Respondent of having handled the appeal that she submitted to the JAB "in the most casual and dilatory way". In effect, 24 months elapsed before the JAB finally gave its recommendation to the Administration. The Administration asked for an extension of the time-limit to reply to the appeal, after that time-limit had expired. The Applicant complains that she was not given the report of the JAB, which had been sent to the Secretary-General on 27 August 1997, until 24 October 1997. She asserts that such delay inflicted "unnecessary anxiety and grievance on the Applicant". The Applicant requests an indemnity of three months salary. The Respondent acknowledges that "[a]t the time when the representative of the Secretary-General requested an extension, the period within which the reply should have been filed had already expired". He submits that "the handling of the matter was late, but not negligent or dilatory" and suggests that the Applicant be paid compensation "proportionate to what has been awarded in other cases". The Respondent asserts that one month's salary should fulfil such condition.

XV. The Tribunal considers that because of the frustrated expectancy provoked in the Applicant by the Administration and in view of the abrupt and inconsiderate manner in which she was treated, she should be paid the equivalent of 18 months of her net base

salary, as compensation. In addition, the Applicant should be paid an equivalent of three months net base salary, for the Respondent's handling of her appeal before the JAB, which caused her unnecessary anxiety and grief.

XVI. For the foregoing reasons, the Tribunal orders the Respondent:

(a) To pay the Applicant the amount of 18 months net base salary at the rate in effect on the date of her separation; and

(b) To pay to the Applicant the additional amount of three months net base salary, at the rate in effect on the date of her separation, for the delays of the Respondent in the handling of her appeal.

XVII. The Tribunal rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Julio BARBOZA
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/908
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 908

Case No. 994: BAGHOUD

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Raghda Baghoud, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 1998, the time-limit for the filing of an application to the Tribunal;

Whereas, on 1 December 1997, the Applicant filed an application requesting the Tribunal:

"[To order:]

a. Rescission of the disciplinary action taken against [the] Applicant, and reinstat[ement] to her previous post, grade and step including [payment of the] difference of annual increments.

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b. Payment of compensation for the injury and hardship sustained by [the] Applicant.

c. Payment of counselling fees and secretarial expenses estimated at US $600."

Whereas, on 7 February 1998, the Applicant filed an additional document;

Whereas the Respondent filed his answer on 13 May 1998;

Whereas the Applicant filed written observations on 30 June 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 21 November 1987, on a temporary assistance basis as Senior Midwife, at the grade 6 level, at the Jaramana Health Centre in the Syrian Arab Republic (SAR). On 1 March 1988, she was granted a temporary indefinite appointment as an area staff member in that same post. On 1 August 1991, she was transferred with promotion to the post of Staff Nurse, at the grade 8 level, at the Yarmouk MCH Sub-Centre. On 15 February 1992, the Applicant was suspended with pay pending investigation of alleged misconduct. On 20 April 1992, she was reinstated and transferred to the Jouber Health Centre. On 1 June 1995, the Applicant was transferred, on demotion, to the post of Senior Practical Nurse (Dental) at the grade 6 level, at the Yarmouk Health Centre. On 20 January 1996, the Applicant was transferred to the post of Senior Midwife, at the grade 6 level, at the Hussaineyyah Health Centre.

During a visit to the Jouber Health Centre on 7 May 1995, the Field Disease Control Officer discovered that the number of children registered as having been vaccinated with Hepatitis B vaccine exceeded the actual number of vaccines consumed. The Applicant was subsequently called to a meeting with the Chief and the Deputy Chief, Field Health Programme, and the Field Nursing Officer. On that occasion, she admitted that she had recorded false numbers of children vaccinated in an attempt to reduce the wastage rate of the vaccine.

On 21 May 1995, the Applicant confirmed in writing that she had intentionally registered imaginary and incorrect numbers of vaccinated children, and that the number of children actually vaccinated was less than she had registered.

On 31 May 1995, the Field Administration Officer sent the Applicant a letter of censure, by which he also informed her that she was being transferred with demotion to the post of Senior Practical Nurse (Dental) at the grade 6 level, at the Yarmouk Health Centre, with effect from 1 June 1995.

On 26 June 1995, the Applicant wrote to the Field Administration Officer, requesting a review of the decision to transfer her on demotion. On 28 June 1995, the Director of UNRWA Operations, SAR, informed the Applicant that, after reviewing her case and personal file, he was satisfied that the decision to transfer her on demotion should stand.

On 8 July 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 19 March 1997. Its evaluation and recommendation read, in part, as follows:

"**III. EVALUATION ...**

...

> (c) The Board noted that the Appellant admitted that she registered false numbers of vaccinated children, and that the number of children vaccinated was less [than] that registered was [an] attempt to reduce the wastage rates of vaccines.
>
> Moreover, the Board believes that the Appellant did not benefit from these actions nor did she cause harm to anyone. Therefore, the Board resolved the three disciplinary measures taken, the first a letter of censure, then transfer, and then demotion, were obviously more than the action deserved.
>
> (d) By reference to the Appellant's personal file, the Board noted that the Appellant had a satisfactory performance and the fact that she was promoted to grade 08 does indicate that she was a good worker.

(e) In this context the Board is of the opinion that the Administration's decision was too harsh for the action committed.

IV. RECOMMENDATION

14. In view of the foregoing and without prejudice to any further oral or written submission ..., the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed with a view to returning the Appellant back to her original grade and step at the time of her demotion."

On 3 June 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board was of the opinion that your actions did not benefit you, nor cause harm to anyone. In the light of your otherwise satisfactory performance, the Board was of the opinion that the disciplinary measures taken were too harsh and recommended that your appeal be allowed and that you be re-transferred to your post at your former grade and step.

I disagree with the Board's conclusions. Your explanation for falsifying Agency records was that you wanted to give a favourable (but untrue) picture of the wastage rates for the vaccine. I presume that thereby you hoped to avoid criticism or to gain approval for your efficiency in relation to the vaccination programme; however, more importantly, by falsifying the data as to wastage, you were concealing inefficiencies which might have resulted in improved vaccination procedures and a consequent saving in the Agency's health budget. It also might have resulted in the Agency distributing false data to the Donor Countries and to the Host Governments, thereby possibly undermining the Agency's credibility. Importantly also, it gave the Agency false data about the penetration of its vaccination programme. I do not consider that the action taken against you to be disproportionate in the circumstances. Accordingly, I reject the Board's conclusions and recommendation and I dismiss your appeal."

On 1 December 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of the Respondent is vitiated by mistake of fact. Contrary to the Respondent's assertion, the Applicant was not "concealing inefficiencies which might have resulted in improved vaccination procedures." The Applicant did not inflate numbers of children vaccinated by a large amount, so the falsification of the data was insignificant.

2. The decision of the Respondent was vitiated by error of law. The Applicant did not have the intent to engage in misconduct. The Applicant should have been served with no more than a reprimand, if any disciplinary measure was to be imposed.

3. The Respondent's decision is vitiated by bias on the part of the Chief, Field Health Program.

Whereas the Respondent's principal contentions are:

1. The Applicant admitted that she deliberately falsified Agency records and was thus guilty of misconduct.

2. The disciplinary action taken was appropriate in the circumstances.

The Tribunal, having deliberated from 27 October to 20 November 1998, now pronounces the following judgement:

I. At all relevant times the Applicant held the post of Staff Nurse (grade 08) at the Jouber Health Centre. Her duties included the administration of Hepatitis B Vaccine to registered refugee children. Her duties also included the keeping of returns and records in relation to children to whom she had administered such vaccine. In his Visit Report to the Jouber Health Centre on 7 May 1995, the Field Disease Control Officer reported that the number of vaccinated children with Hepatitis B Vaccine (registered on the Daily Journal of Work) did not match the number of vaccine vials consumed at each session (i.e. the number registered was more than the number of vaccinated children).

II. As a result, the Applicant was called to the Field Office on 17 May 1995, for investigation of the case and questioning about what had been reported by the Field Disease Control Officer. In a "Note for the Record", the Field Disease Control Officer reported that the Applicant admitted recording "false numbers of vaccinated children on the Daily Journal of Work (i.e. more than the actual numbers) in an attempt of [sic] her to reduce the wastage rates of vaccines." On 21 May 1995, she signed a statement (which was in Arabic, her native language), the translation of which reads as follows:

> "I, the undersigned, ..., admit and confess that I have registered imaginary and incorrect numbers of children vaccinated against hepatitis. The actual numbers of vaccinated children is less than the registered number. I did this deliberately, in an attempt to reduce the percentage of wasting the vaccines".

III. Disciplinary action was initiated. It resulted in a letter dated 31 May 1995, from the Field Administration Officer, Syria, to the Applicant, which noted that the Applicant had admitted during questioning that she "had been recording false numbers of vaccinated children, attempting thereby to reduce the wastage rate of vaccine" and that she had admitted this in writing on 21 May 1995. She was informed that the letter was a letter of censure and that she would be transferred, on demotion, to the post of Senior Practical Nurse (Dental), at grade 06, effective 1 June 1995.

IV. The Applicant appealed against that disciplinary decision to an Area Staff Joint Appeals Board (JAB). The JAB noted that she had admitted that she had registered larger numbers of vaccinated children than those actually vaccinated, in an attempt to reduce the wastage rate of vaccines. The JAB accepted that the Applicant had not benefitted from those actions nor had she caused harm to anyone and that the letter of censure, the transfer and the demotion were more than her actions deserved. It recommended that the administrative decision appealed against be reviewed with a view to returning the Appellant back to her original grade and step as of the time of her demotion.

The Commissioner-General, having considered the report of the JAB, expressed disagreement with the Board's conclusion and recommendation. He added:

> "Your explanation for falsifying Agency Records was that you wanted to give a favourable (but untrue) picture of the wastage rates for the vaccine. I presume that thereby you hoped to avoid criticism or to gain approval for your efficiency in relation to the vaccination programme; however, more importantly, by falsifying the data as to wastage, you were concealing inefficiencies which might have resulted in improved vaccination procedures and a consequent saving in the Agency's health budget. It also might have resulted in the Agency distributing false data to the Donor Countries and to the Host Governments, thereby possibly undermining the Agency's credibility. Importantly also, it gave the Agency false data about the penetration of its vaccine programme. I do not consider that the action taken against you to be disproportionate in the circumstances. Accordingly, I reject the Board's conclusions and recommendation and I dismiss your appeal."

V. The Applicant appeals against that decision to the United Nations Administrative Tribunal.

VI. In her application, the Applicant makes a somewhat different case or gives a somewhat different explanation for her actions than that which she gave to her superiors on 17 May 1995, and in her written statement of confession dated 21 May 1995. She claims that since any portion of a vial of vaccine that has been opened, which is not used immediately, would have to be discarded, she used this surplus, which otherwise would have been wasted, to vaccinate unregistered children. Thus, she now asserts, she had included the names of unregistered children in her daily work record, which should only have contained the names of registered children, who were entitled to vaccination under the particular programme. She also claims that she had volunteered information as to what she was doing and why she was doing it to the Field Disease Control Officer, on his visit to the Jouber Health Centre on the 7 May 1995, but again there is no evidence to support this assertion nor was there any document to this effect apparently included in the papers which had been furnished to the JAB.

VII. The Tribunal is satisfied that whatever the true version, it is beyond controversy that she was intentionally and knowingly falsifying the contents of her register of the Daily Journal of Work, being the official records kept in relation to the programme, and that this might have had the serious consequences mentioned by the Commissioner-General in his letter to the Applicant dated 3 June 1997, as quoted above.

VIII. The Applicant submits that the decision of the Respondent to censure and to transfer on demotion the Applicant, as a disciplinary measure, is vitiated by alleged mistakes of fact, errors of law and indications of bias. In support of these contentions, she firstly asserts that she cannot have known or believed that what she was doing was wrong because it was she who took the initiative to discuss the discrepancy of the procedures with the Field Disease Control Officer on 7 May 1995. Whilst there is no evidence that it was she who took such an initiative or that she had volunteered the information to the Field Disease Control Officer, the Tribunal is prepared to deal with this application on the assumption that this was so. Even if it was so, it is clear that the accuracy of the records was the subject matter of the Field Disease Control Officer's inquiry and that it was in that context that the matter was raised. The Tribunal is therefore satisfied that, even if the Applicant had volunteered the information which she says she provided, this afforded the Applicant no excuse for her actions nor does it demonstrate that the version she now gives is the true one. The Tribunal is satisfied that she must have known that what she was doing was wrong and that, as a nurse, she must have known that her actions could have serious consequences. Even if the version that she now alleges is the correct one, that she was using vaccine, which would otherwise have been wasted, on unregistered children, this could have had serious consequences not only in the manner stated by the Respondent in his letter of 3 June 1997. If she had been vaccinating unregistered children, this, in itself, could have resulted in contra-indicated medical treatment being subsequently afforded to those children, if they had been vaccinated but no record thereof had been kept in relation to *their* medical records.

IX. On either version, the Tribunal is satisfied that the falsification of records, even if done without adverting to the possible consequences or without intending to cause possible harm, would have inevitably been considered as either wilful misconduct, irresponsible conduct or wilful failure on the part of the Applicant to perform her assigned duties, of such a nature as would have warranted disciplinary measures being taken against her. To falsify records of this nature, be it to conceal the true extent of the wastage of vaccine or to vaccinate children not registered as being entitled to be vaccinated under the programme, is not, in the opinion of the Tribunal, capable of being considered as mere innate inefficiency or incapacity such as would, under area staff rule 110.1, warrant appropriate administrative action, rather than disciplinary measures.

X. Subparagraph 4.3. of personnel directive A/10/Rev.1/Amend.1 categorizes an instance where disciplinary measures would normally be imposed as wilful or irresponsible failure to comply with contractual obligations. The Tribunal is satisfied that the Applicant had a duty to keep proper and accurate records and that she wilfully and irresponsibly failed to do so.

XI. The Applicant argues that the Respondent was in breach of paragraph 4.4. of personnel directive A/10/Rev.1/Amend.1 in that he failed in his obligation to maintain consistent patterns of disciplinary action for similar types of offences. She alleges that other nurses concealed losses or wastage of vaccine and that the Respondent's records establish this, but that no other nurses have been disciplined in relation to what they have done. No evidence has been furnished in support of this allegation. No instance has been given as to any other nurse having been found to have falsified records and let off without disciplinary measures being taken against such person.

XII. The Applicant further argues that the Respondent failed to comply with the provisions of paragraph 4.5 of personnel directive A/10/Rev.1/Amend.1 which provides in

the first sentence that "disciplinary measures should normally be imposed in a progressive fashion as outlined in Paragraph Six below". This is the only portion of the subparagraph quoted in the Applicant's submission. However, the subparagraph continues as follows in the second sentence: "However, the specific disciplinary action need not follow the programme sequence as outlined but will depend on the particular circumstances of the case". The forms of disciplinary measures set out in paragraph 6 are as follows:

(A) Written censure

(B) Suspension without pay

(C) Demotion

(D) Termination for misconduct

(E) Summary dismissal

XIII. The Tribunal is satisfied that there is no binding obligation to impose disciplinary measures in the sequence outlined above and that the decision cannot be impugned or invalidated on the grounds that the disciplinary action taken against the Applicant involved written censure and demotion, without an intervening period of suspension without pay.

XIV. The Applicant argues that the Respondent's conclusion that "by falsifying the data as to the wastage [the Applicant was] concealing inefficiencies which might have resulted in improved vaccination procedures" is controversial, in that no remedial steps or controls have been introduced since that time to reduce waste. She also takes issue with the Respondent's conclusion that it "might have resulted in the Agency distributing false data to the Donor Countries and to the Host Governments, thereby possibly undermining the Agency's credibility." The Applicant contends that this conclusion is equally controversial, because the number of vaccinations of registered children actually carried out by the Applicant as opposed to the number reported by her in her returns, is small and would be of no significance in relation to an epidemic. The Tribunal is satisfied that a mere statement that these conclusions were controversial provides the Applicant with no answer

to the entitlement of the Respondent to have determined to take disciplinary measures. The Tribunal is further satisfied that those conclusions were based on reason and that the Respondent was entitled to form the view which he so formed.

XV. The primary contention made on behalf of the Applicant is that the disciplinary measures which the Respondent took in relation to the Applicant were excessively harsh in all of the circumstances. The Tribunal will normally not interfere with a disciplinary decision taken on the grounds that it is excessively harsh, unless it is satisfied that it is so disproportionate or unwarranted as to amount to an injustice. The Tribunal will not substitute its own view as to the appropriateness of a disciplinary measure for that actually taken, unless it is satisfied that the measure actually taken could not in justice be said to be proportionate. The Tribunal is satisfied that the measures taken by the Respondent against the Applicant were not disproportionate and that the Respondent was entitled to take a serious view of the misconduct of the Applicant because of its potential consequences. The Tribunal is further satisfied that the argument that the seriousness of the conduct should be measured by the intention of the Applicant is misconceived and that *mens rea* is only one aspect to be considered in determining what disciplinary measure is appropriate in any particular circumstance. The Tribunal is satisfied that the Applicant wilfully falsified records in relation to her work and that the Respondent was entitled to take a serious view of her actions having regard to their potential consequences.

XVI. Allegations of bias have been made against the Respondent in that the Field Administration Officer, Syria, had had sight of and presumably considered the Field Disease Control Officer's Note for the Record concerning the investigation and the questioning of the Applicant, before the Field Administration Officer, Syria, took the initial decision to censure and to transfer the Applicant on demotion and before the Commissioner-General determined not to accept the JAB's conclusions and recommendations. The Applicant argues that the Note for the Record contained

misleading, irrelevant and prejudicial information of no probative value insofar as the charges against her were concerned, and that this prejudiced the decisions taken. This information was that "her records in the past three years have shown that her performance was of an unacceptable standard as she was subject to investigation by a Board of Inquiry and in addition her relationships with staff members were of low standards". The Tribunal is satisfied that there is no evidence to support the Applicant's contention. The letters in the first instance from the Field Administration Officer, Syria, in which he sets out his reasons for his decision to censure the Applicant and transfer her with demotion and secondly, from the Commissioner-General, which stated why he was dismissing the Applicant's appeal and rejecting the conclusions and recommendations of the Board of Inquiry set out in detail why those decisions were made. It is clear from those letters that the decisions were based only on relevant facts, namely that the Applicant had falsified records. There is certainly no evidence of bias and none to suggest that the extraneous matters were taken into account or that they influenced either person adversely.

XVII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/909
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 909

Case No. 1003: SIMS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 25 November 1997, Winston Sims, a former staff member of the United Nations, filed an application that did not fulfil all the requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 January 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"The Tribunal is requested to find:

1) That the memo ... of 14 April 1992: i) is a "special report" in the context of ST/AI/240/Rev.2 and ST/AI/292 and not a "note for the file"; ii) did not reflect and did not meet the standards set forth in para. 2 of ST/AI/240/Rev.2 and, iii) since the PERs [performance evaluation reports] for 1986-89 and 1989-92 were, for similar reasons, thrown out in the first instance by the Secretary-General on the recommendation of the JAB [Joint Appeals Board] and in the second instance by OHRM [Office for Human Resources Management] itself, therefore, iv) should also be thrown out;

...

6) That the Applicant has been denied, for the last decade of his service with the United Nations, any fair, consistent, objective and impartial assessment or statement of his performance and, therefore, has also been denied any sound foundation for assessment of his capabilities by firms outside of the United Nations for purposes of future employment;

...

And to order:

i) That a recommendation be made to the Secretary-General that the behaviours of the officials involved be referred to the Joint Disciplinary Committee for examination of breach of trust, abuse of authority, discrimination, prejudice and other persistent violations of the requirements of the Code of Conduct; ii) That the Applicant be awarded 5 years' salary for the pain, distress, destruction of [his] career ...; and iii) such other remedies as the Administrative Tribunal believes appropriate."

Whereas the Respondent filed his answer on 31 August 1998;

Whereas, on 21 September 1998, the Respondent submitted additional documents, in response to the Applicant's request for production of such documents;

Whereas the Applicant filed written observations on 29 October 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 August 1973, on a one-year fixed-term appointment at the P-2 level, as Associate Social Affairs Officer, in the Department of Economic and Social Affairs. The Applicant's appointment was successively extended, and on 1 April 1975, he was promoted to the P-3 level, as Social Affairs Officer. On 1 April 1976, his appointment became permanent. On 1 April 1979, he was promoted to the P-4 level. On 22 October 1979, he was transferred from Headquarters to the Department of International Economic and Social Affairs, Centre for Social Development and Humanitarian Affairs (CSDHA), Social Welfare Services Section

in Vienna. On 21 September 1993, the Applicant was transferred to the Department for Policy Coordination and Sustainable Development in New York as a result of organizational restructuring. On 31 December 1995, the Applicant separated from service pursuant to an agreed termination.

In a memorandum dated 14 April 1992, the Officer-in-Charge, Developmental Social Welfare and Social Integration Branch (DSWSIB), Social Development Division (SDD), Developmental Social Welfare Unit (DSWU) (hereinafter "OIC, DSWU"), explained to the Chief, Personnel Service, United Nations Office in Vienna (UNOV), his views on the Applicant's performance and recommended that the Applicant's within-grade salary increment be withheld on the ground that the Applicant's performance had been "entirely unsatisfactory".

On 27 April 1992, the Officer-in-Charge, Personnel Service, transmitted a copy of the above communication to the Applicant and informed him as follows:

> "... [O]n the basis of your performance as reflected in the attached special report, Personnel Service is taking the necessary action to withhold your increment ... in accordance with the provisions of ST/AI/240/Rev.2 ..."

On 29 May 1992, pursuant to a request made by the Applicant on 1 May 1992, the Personnel Officer, Personnel Service wrote to the Director, SDD, CSDHA, and to the Chief, DSWSIB, SDD, CSDHA, seeking their views on the evaluation of the Applicant contained in the 14 April memorandum. On 22 June 1992, the Chief, DSWSIB, SDD, CSDHA, responded, "I was surprised when I read it. ...I find it difficult to agree with [the author's] assessment of [the Applicant]." On 23 June 1992, the Director, SDD, CSDHA, responded that his "basic views on the evaluation of [the Applicant's] performance ... have been expressed by withholding the staff member's grade salary increment."

Also on 23 June 1992, a Personnel Officer, OHRM, informed the Chief, Personnel Service, UNOV, by cable as follows:

"I NOTE THAT RECOMMENDATION FOR WITHHOLDING OF WITHIN-GRADE INCREMENT WAS MADE ON 14 APRIL 1992 I.E. AFTER REVIEW DUE DATE OF 1 APRIL 1992. UNDER PD/1/69 WITHHOLDING OF SALARY INCREMENT CANNOT BE RETROACTIVE. CONSEQUENTLY INCREMENT NEEDS TO BE REINSTATED. ALSO MEMORANDUM DATED 14 APRIL 1992 FROM [THE OIC, DSWU] TO YOU SHOULD NOT BE TREATED AS SPECIAL REPORT BUT AS NOTE FOR THE FILE. MOST IMPORTANTLY I NOTE THAT NO PER [PERFORMANCE EVALUATION REPORT] PREPARED SINCE 1986. IT IS IMPERATIVE THAT UPDATED PER BE PREPARED AS SOON AS POSSIBLE."

On 1 July 1992, the Personnel Officer, Personnel Service, informed the Applicant, "Following a further review of your case, it has been decided on procedural grounds to reinstate the due increment with retroactive effect as of 1 April 1992."

On 2 July 1992, a PER for the period 16 July 1986 to 31 July 1989 was signed by the Assistant Director-in-Charge, DSWSIB, as First Reporting Officer. The ratings consisted of three A's and eleven B's. On 7 July 1992, the Director, SDD, CSDHA, signed the PER as Second Reporting Officer, giving the Applicant an overall rating of "A very good performance". He added the following comment: "I have rated the staff member according to ratings provided by the First Reporting Officer. In my view, however, some of the ratings have been inflated."

On 15 July 1992, the OIC, DSWU, wrote to the Applicant, criticizing the contents of review papers he had prepared, complaining that the Applicant had failed to address the assignments in the manner requested, and noting that three of the papers were submitted late.

On 15 October 1992, the OIC, DSWU, wrote to the Applicant suggesting that he "complete as soon as possible [his] section of the PER" for the period 1989-1992, and noting that after the OIC, DSWU, completed his section, the Applicant "will then in due course have an opportunity to take recourse in respect to anything with which [he] disagree[s]".

On 28 October 1992, the OIC, DSWU, wrote to the Applicant, stating, in part, as follows:

> "You have expended far more energy in identifying reasons for not complying with my requests [to carry out the assignments given to you] than you have in contributing to the work of our team. ... Judging from your past performance and attitude, I can have no confidence whatsoever that, even if I wait a second year, you will have contributed very much more of value than you have done during the first year of this programme. Consequently, ... I am obliged to instruct you to cease all further work on the assignments given to you in September 1991. I have no option but to add these tasks to the work of the other professional staff in the Unit, including myself. ..."

On 29 October 1992, the Officer-in-Charge, Personnel Service, advised the OIC, DSWU, "In the event that [the Applicant] continues to refuse to complete Part A of Section II of his performance evaluation report in a timely manner, you and the other reporting officers should nevertheless proceed with completion of your respective sections. ..."

On 2 November 1992, the Applicant sent to the Director, SDD, CSDHA, a fourteen-page memorandum, with 28 annexes, in which he complained about the conduct of the OIC, DSWU, accusing him of abuse. He questioned the adherence by the OIC, DSWU, to the "Standards of Conduct of International Civil Servants". The Applicant also objected to the 14 April memorandum and contested the critical remarks made by the OIC, DSWU, in his 15 July and 28 October 1992 memoranda.

On 1 December 1992, the Applicant wrote to the Chief, Personnel Service, UNOV, arguing that the 14 April memorandum "could enjoy no real legitimacy as it seems to meet none of the minimum standards or requirements called for" by ST/AI/240/Rev.2. He also questioned the appropriateness of completing any PER in the light of the circumstances surrounding the 14 April memorandum.

On 4 December 1992, the Officer-in-Charge, Personnel Service, wrote to the Applicant, summarizing his earlier discussions with the Applicant as follows:

"2. ...

(a) [The OIC's] memorandum of 14 April 1992 was submitted as a special report in support of his recommendation to withhold your annual increment;

(b) Following consultation with Headquarters, we were advised that since withholding of an increment cannot be done retroactively, the recommendation and report would have had to be received before 1 April, i.e. the first of the month in which the increment became due;

(c) On account of this technicality, the increment was restored;

(d) OHRM also advised us that the 'memorandum dated 14 April 1992 from [the OIC, DSWU] to you should not be treated as special report but as note for the file';

(e) That memorandum therefore falls under the category of 'adverse material' as described in para.2 of ST/AI/292; the concerned staff member may submit comments in rebuttal (the formal rebuttal procedure set out in paras. 10-15 of ST/AI/240/Rev.2 would not apply to this type of material).

..."

After several further communications between the Applicant and the Administration concerning completion of his PER, on 18 December 1992, the Chief, Personnel Services, UNOV, wrote to the Applicant again requesting him to complete his section of the PER and noting that ST/AI/240/Rev.2 and the Staff Rules provided for an adequate review process. On 22 December 1992, the Applicant requested that the Chief, Personnel Service, "not proceed with the implementation of the PER until [the issues he had raised] have been resolved."

On 11 January 1993, the Personnel Officer, Personnel Service, instructed the OIC, DSWU, "to proceed with the completion of Section II (Part B) and Section III of the [Applicant's] PER", noting that the Applicant "ha[d] not complied with the deadline for the completion of Section II, Part A of his PER". By copy of that memorandum, the Personnel

Officer requested the Second and Third Reporting Officers to complete their sections of the PER as well.

On 19 January 1993, the Applicant wrote to the Chief, Personnel Service, asking that his memorandum of 2 November be placed in his Official Status File as a partial response to the statement by the Officer-in-Charge, Personnel Service, that the 14 April memorandum falls within the terms of ST/AI/292.

On 20 January 1993, the Chief, Personnel Service forwarded to the OIC, DSWU, a list of the Applicant's "Tasks and assignments", which he had received from the Applicant on 14 January. The Chief, Personnel Service, suggested that the OIC, DSWU, take the list into consideration when preparing his evaluation. Also on 20 January, the Chief, Personnel Service, informed the Applicant that his list had been forwarded to the OIC, DSWU, and suggested that he contact the OIC, DSWU, immediately to arrange to complete and sign Section II, Part A of his PER.

On 3 February 1993, the Applicant requested the Secretary-General to review the decision of the Officer-in-Charge, Personnel Service, dated 4 December 1992, to treat the communication of 14 April 1992 as a Note for the file.

On 8 February 1993, the Director and Deputy to the Under-Secretary-General, UNOV, wrote to the Applicant, who had provided the former with a copy of his memorandum of 2 November with attachments, stating in part as follows:

> "...
>
> 2. The written material that you provide paints a sad picture of a hopelessly deadlocked situation, in which you appear to accuse [the OIC, DSWU], of completely failing in his duties as supervisor while he sees as [sic] a serious deficiency in your performance as evidenced by his recommendation that your increment be withheld.
>
> ...

5. All considered, it seems best to resort to the mechanisms that the Organization provides. The performance evaluation procedure seems an appropriate tool in this regard, since it would involve all supervisors within the Division and, if rebutted, provides for an independent panel to look into the matter."

On 18 February 1993, the Applicant requested the Secretary-General to review the decision of 18 December 1992 by the Chief, Personnel Service, UNOV, requesting the Applicant to complete his section of the PER for 1989-1992.

On 22 April 1993, the Director, Social Development Division, signed the Applicant's PER for August 1989 to July 1992. The OIC, DSWU, was the First Reporting Officer. It was noted that the Applicant had failed to complete Part A.

On 18 and 25 May 1993, the Applicant lodged appeals with the JAB against the decisions contained in the 18 December 1992 memorandum from the Chief, Personnel Service, and the 4 December 1992 memorandum from the Personnel Officer, Personnel Services, respectively. On 24 June 1993, the Applicant requested the Secretary, JAB, to join the two appeals.

On 20 November 1995, the Chief, Cluster V, Operational Services Division, OHRM, informed the Applicant as follows:

" After looking into the circumstances under which your performance report for the [period 1989-1992] has been prepared, it has been decided that not all the provisions of the ST/AI/240/Rev.2 were followed and therefore, the validity of that report may be questioned. Therefore, we consider that the report in question should be disregarded and not included in any official status file.

...

By copy of this memorandum, the Executive Office, DPCSD, is requested to fill in the PER for you from August 1989 up to now."

On 29 December 1995, the Applicant replied as follows:

"... I believe that OHRM has let so much time lapse in reaching this conclusion that it is no longer possible to retrieve the opportunities it had available almost three years ago. ...

... I believe that any PER, covering that period, prepared at this date would also not be in keeping with the letter and intent of ST/AI/240/Rev.2.

Since OHRM took the decision, which is welcome, nonetheless, only a few weeks shy of my retirement, I believe, it has not [been] able to undo any of the enormous damage to my reputation and career within the Organization that was done by the rogue actions of a few officials."

The JAB adopted its report on 30 April 1997. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

45. The Panel unanimously found that:

(a) Preparation of the PER concerning the period 1986-1989 was procedurally defective and that the PER concerning the period 1989-1992 was flawed - and rightly withdrawn. Neither should form part of his record.

(b) While the Appellant had not proved that the contested decision had been motivated by prejudice or other ulterior motives, he had given significant evidence of a failure to fulfill managerial responsibility and to observe proper procedures on the part of his supervisors.

(c) While it could not be found that the Appellant had suffered any specific damage to his career on account of the above, the Appellant had suffered moral injury and considerable distress which could have been avoided had the proper procedures been adhered to. For this failure to observe his conditions of service, he deserved to be compensated.

46. The Panel unanimously recommends that the Appellant be granted compensation in the amount of one month's net salary, and that in the absence of any formal record of his last 9 years of service, he be provided with a statement that this had been satisfactory."

On 28 July 1997, the Officer-in-Charge, Department of Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that:
>
> a) Preparation of the PER concerning the period 1986-1989 was procedurally defective and that the PER concerning the period 1989-1992 was flawed - and rightly withdrawn. Neither should form part of the record.
>
> b) While you had not proven that the contested decision had been motivated by prejudice or other ulterior motives, you had given significant evidence of a failure to fulfill managerial responsibility and to observe proper procedures on the part of your supervisors.
>
> c) While it could not be found that you had suffered any specific damage to your career on account of the above, you had suffered moral injury and considerable distress which could have been avoided had the proper procedures been adhered to. For this reason, you deserve to be compensated.
>
> Finally, the Secretary-General has taken note of the Board's unanimous recommendation and has decided to accept it, namely that you be granted compensation in the amount of one month's net base salary, and that in the absence of any formal report of your last nine years of service, you be provided with a statement that this had been to the full satisfaction of the Organization. The Secretary-General has decided to take no further action regarding your case."

On 28 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the provisions of ST/AI/240/Rev.2 by placing the 14 April 1992 memorandum of the OIC, DSWU, in the Applicant's Official Status file without giving him the opportunity to rebut that memorandum. That memorandum was a

"special report", rather than a "Note for the file" and was thus subject to the terms of ST/AI/240/Rev.2.

2. The Respondent treated the Applicant with extreme prejudice and discrimination by failing to apply the appropriate rules for his PERs and for the 14 April memorandum and related correspondence, causing the Applicant moral injury, anguish and distress.

Whereas the Respondent's principal contentions are:

1. This application is not receivable under the terms of article 7 of the Tribunal's Statute.

2. Should the Tribunal decide that the application is receivable, the Respondent concedes that procedural errors were made but asserts that they were corrected without detriment to the Applicant.

The Tribunal, having deliberated from 28 October to 20 November 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 28 July 1997. That decision adopted a unanimous Joint Appeals Board (JAB) recommendation that the Applicant be granted compensation in the amount of one month's net base salary. In addition, the JAB recommended that, in the absence of any formal report of the Applicant's last nine years of service, he be provided with a statement that his performance during that period had been to the full satisfaction of the Organization.

II. Prior to considering the case on the merits, the Tribunal must determine whether the Applicant's case is receivable according to article 7 of the Tribunal's Statute. The Respondent claims that certain of the Applicant's pleas have already been upheld by the

JAB and accepted by the Secretary-General and therefore are not receivable under the terms of article 7.2 of the Statute. However, the Tribunal notes that an application may be receivable under article 7.3 in cases where the Secretary-General has accepted the JAB's recommendations favourable to the Applicant, but the Applicant considers the outcome to be unfavourable (cf. Judgement No. 739, Chakravarti (1995)). Having reviewed the record, the Tribunal disagrees with the Respondent on this point and considers that a number of the JAB's recommendations were unfavourable to the Applicant. Therefore, the Tribunal finds that the application is receivable.

III. The record indicates that there were many errors committed by the Administration and numerous procedural flaws that were never corrected. For example, the memorandum dated 14 April 1992, which recommended that the Applicant's within-grade increment be withheld, did not fulfil the formal requirements of a special report under ST/AI/240/Rev.2, paragraphs 16 and 18. That memorandum was not submitted before the salary increment was due. Nor was it in the correct form. Subsequently, the increment was reinstated. The Applicant has requested that the memorandum of 14 April 1992, be removed from his file. However, the Tribunal does not find any justifiable reason for removing such a document from the personnel file of the Applicant.

IV. In addition, the lack of proper performance evaluations reports (PERs) for the last nine years of the Applicant's employment in the Organization, constitutes a glaring violation of procedure on the part of the Respondent. The Tribunal agrees with the JAB that "the delay in completing the [PER for the period 1986-1989] and its explicit use as a tool to settle a 'hopelessly deadlocked situation' were seriously prejudicial to the [Applicant]."

V. Regarding the PERs for the periods 1989-1992 and 1992-1995, the Respondent, once again, did not comply with all the provisions of ST/AI/240/Rev.2. The latter PER,

covering the period ending 31 December 1995, should have been provided to the Applicant before his departure. It appears that it had not even been prepared by that time.

VI. Based on the foregoing, the Tribunal finds, as did the JAB, that the Applicant's rights in regard to having up-to-date and proper PERs have been violated. However, the amount of compensation recommended by the JAB is insufficient in light of the serious prejudice caused to the Applicant by the numerous procedural flaws surrounding his case.

VII. Therefore, the Tribunal orders the Respondent to pay the Applicant as compensation, an additional amount equal to three months of his net base salary at the rate in effect on the date of his separation from service.

VIII. The Tribunal rejects all other pleas.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah TAYLOR ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/910
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 910

Case No. 1006: SOARES

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Julio Barboza; Mr. Chittharanjan Felix Amerasinghe;

Whereas at the request of Belmira F. Soares, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 September 1997, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 February 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"(a) *To rescind* the decision of the Secretary-General dated 27 June 1997 not to take further action in regard to her case;

(b) *To find and rule* that the Letter of No Contest signed by the Applicant was the product of duress and misinformation and was therefore invalid; that the decision to place the Applicant on SLWFP [special leave with full pay] was procedurally flawed, improperly motivated and violated the Applicant's contractual rights; that the exercise of the Respondent's discretion in

refusing to grant the Applicant SLWFP for study purposes was arbitrary and discriminatory; and that the refusal of the Respondent to commute her annual leave entitlement to cash at the start of her status on SLWFP is arbitrary and capricious;

...

(d) *To order* the Applicant's immediate reinstatement with international status for a period of not less than two years;

(e) *To award* the Applicant compensation in the amount of two years salary as well as two months additional salary for the loss of her annual leave together with interest thereon;

(f) *To award* the Applicant in addition appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(g) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(h) *To award* the Applicant as costs, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 5 August 1998;

Whereas the Applicant filed written observations on 21 October 1998;

Whereas, on 10 November 1998, the Tribunal put questions to the Respondent, to which he provided answers on 13 November 1998;

Whereas, on 13 November 1998, the Tribunal ruled that no oral proceedings would be held in this case;

Whereas, on 17 November 1998, the Applicant submitted comments on the Respondent's 13 November submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in Addis Ababa, Ethiopia, on 1 January 1974, on a three-month fixed-term appointment as Secretary, at the GS-8 level. Her contract was extended several times. On 16 April 1979, her functional title was changed to Senior Secretary, and on 1 July 1980, she was granted a permanent appointment. The Applicant was promoted to the GS-9 level with effect from 1 January 1981. On 1 April 1990, her appointment was converted from local to international status. On 1 October 1993, she was placed on special leave with full pay (SLWFP) and was separated from service on 30 June 1995, pursuant to an agreed termination.

On 22 January 1987, and again on 3 November 1989, the Applicant wrote to the UNDP Director, Division of Personnel (DOP), seeking conversion of her status to internationally recruited, noting that the prior incumbents of her post had been international recruits, that her workload had increased substantially, and that, as a foreigner living in Ethiopia, she was experiencing financial difficulties. On 8 March 1990, the Director of Personnel informed the Resident Representative in Addis Ababa that the UNDP Governing Council had approved an Field Service Level (FSL) post for the country office, available for the deployment of the Applicant on international status for a five-year period, after which she would be considered for similar assignments elsewhere or revert to general service status. On 9 May 1990, a Personnel Officer offered the Applicant an international assignment at the FSL-5 level and informed her that there would be "no lien on [her] local post". The Applicant accepted the offer on 13 June 1990.

During January and February 1993, the Applicant wrote a series of letters to the Administration, requesting the continuation of her FSL post for the remaining two years of her FSL assignment at any duty station, and, in the light of information that the FSL posts were to be phased out, placement in a P-1 post for the subsequent five years until retirement age.

On 4 May 1993, the Director, Human Resources Planning and Change Management (HRPCM), wrote to the Applicant recapitulating their earlier discussions and setting out the options available to her, as follows:

> "1. Reassignment to another field office. As the FSL function will be abolished UNDP-wide as from 1 January 1994, reassignment under FSL conditions is not a viable option anymore.
>
> 2. Conversion of your contract to a local appointment if a post is available in Addis. However, from next year you would be paid a local salary, lose your international benefits, including educational entitlements for your children, and your current pension entitlements may be reduced.
>
> 3. Agreed separation from the Organization on early retirement. The separation conditions in your case would be as follows:
>
> Upon separating from the Organization in accordance with the provisions of staff regulation 9.1 (a), at a date to be determined by your office, you will receive payment of 12 (twelve) months salary plus an exceptional payment of six (6) months additional indemnity in accordance with the provisions of staff regulation 9.3 (b) plus three (3) months in lieu of notice under staff rule 109.3 (c). Altogether, this amounts to a payment of 21 months net salary. In addition, if you have any accrued annual leave, up to 60 days will be paid to you.
>
> You can either choose to have the equivalent amount paid in a lump sum upon separating, or you can opt to go on special leave with full pay for the equivalent amount of time and separate officially at the end of that period at which time you would be eligible for early retirement as an international staff member - I understand that this will also coincide with your husband's retirement. For the evaluation of these two options it is important to note that throughout the period of your SLWFP your international entitlements, including education benefits for your children, would continue. You would also continue contributing to the pension plan during these months, and it would give you time to plan for your retirement in Portugal. Finally, this option would, in fact, give you the full five years as an FSL as had been envisioned when you first took up your FSL assignment in April 1990."

On 18 June 1993, the Applicant signed a "Letter of No Contest", addressed to the Resident Representative a.i., UNDP, Addis Ababa, which read as follows:

> "I hereby certify that I will not contest the termination of my permanent appointment effective 1 October 1993 under the terms and conditions specified below.
>
> This Letter of No Contest is signed by me in accordance with the provisions of staff regulation 9.1, 9.3 and staff rule 109.3 and in accordance with paragraph 3 of [the Director, HRPCM's] letter of 4 May 1993 stipulating the terms of payment under special leave with full pay (SLWFP) upon separation from the service of UNDP at the end of September 1993."

On 24 June 1993, the Administrative Officer, Career Development and Training Unit, informed the Resident Representative, UNDP, Addis Ababa that "by virtue of passing the Competitive Examinations for the French Language Fellowship given by the French Government to United Nations Agencies, [the Applicant had] been selected to go for a two month (August and September 1993) training in French Language Intensive Course at Grenoble, in France". On 12 July 1993, the Applicant requested the Director, HRPCM, inter alia, to grant the Applicant SLWFP for the two-month French course. On 14 July 1993, the Resident Representative sought the advice of the Personnel Officer, DOP/UNDP, New York, as to whether the Applicant could be accorded special leave with full pay during those two months, pointing out that other UN agencies permit SLWFP for such courses.

On 6 August 1993, after the Applicant had left for France, the Director, HRPCM, faxed a response, stating:

> "... We are, of course, delighted for [the Applicant] [for] having been so successful and to have gained this opportunity to perfect her French in the country itself, and are naturally inclined to be as sympathetic as possible to her request. Therefore, we have carefully considered her request for SLWFP during the two-month period of the course, also noting other agencies' practice. In light of the fact that on 1 October [the Applicant] will proceed on SLWFP already for 21 months as part of a separation agreement with the Organization, however, we

> feel that it is more appropriate that she use her annual leave entitlement to cover this period. Please remember in this regard that during the 21-month period of SLWFP she will also accrue annual leave. ..."

On 26 October 1993, the Applicant wrote to the Director, HRPCM, expressing her disagreement with the decision to deny her request for SLWFP, on the grounds that (1) during August and September 1993 she was in active service with UNDP, (2) she had signed the "Letter of No Contest" on the understanding that she would receive all the UN benefits for another 21 months, and (3) that under UN Regulations and Rules, she was "entitled to this leave with full pay."

The Director, HRPCM, responded by letter dated 10 December 1993 and explained:

> "... it must be understood that this is not a fundamental right for every staff member going on study leave. Indeed the UN Rules and Regulations specify that special leave - unspecified whether with or without pay - may be granted when it is in the interests of UNDP. The usual practice in these cases is to give the staff special leave without pay. ... No regular staff member would have been given special leave with full pay for a study leave either, unless there were unusual, special circumstances ..."

On 15 March 1994, the Applicant wrote to the Director, Regional Bureau for Africa, UNDP, claiming, inter alia, that she had been incorrectly informed that all FSL posts were being phased out when, in fact, such posts still existed in other duty stations. She further stated in that letter that she "was pressured by UNDP office in Addis Ababa in July 1993 to sign the Letter of No Contest ..." On 10 April 1994, the Applicant wrote to the Chairperson, UNDP/UNFPA Staff Council, stating that she was "forced by UNDP here to go on SLWFP from October 1, 1993 and was pressured against [her] will to sign the 'Letter of No Contest'." On 22 November 1994, she wrote to the Administrator, UNDP, claiming that she had been victim of discrimination and alleging again that she was "forced to sign the Letter of No Contest against [her] will." (Emphasis in original.) She indicated

that not all FSL posts had been abolished and asked for reinstatement "in UNDP or in any UN office for another five years ..."

By memorandum dated 2 December 1994, the Applicant informed the Assistant Resident Representative (Admin) a.i., UNDP, Addis Ababa, that she understood that all locally recruited staff members placed on SLWFP were "paid a compensation of accrued leave of 60 days upon commencement of SLWFP", and that although she had 68 days of accrued annual leave as of 30 September 1993 these had not been commuted to cash upon commencement of her SLWFP on 1 October 1993. She asked that arrangements be made to pay her the "compensation for 60 days annual leave accrued".

The Deputy Resident Representative (Operations) responded on 12 December 1994, pointing out that she had a leave balance of 7.5 days upon commencement of her SLWFP and that she had already been advised by memorandum dated 6 August 1993 that her language training in France had been covered by her annual leave.

On 31 January 1995, the Applicant requested the Secretary-General to review the administrative decision to separate her from UNDP before the expiration of her contract, as well as the decision to deny her request for SLWFP for her French course in Grenoble and the denial of her request for 48.5 days compensation at the start of her SLWFP.

Also on 31 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 22 February 1995, the Assistant Secretary-General for Human Resources Management acknowledged receipt of the Applicant's letter dated 31 January 1995 and informed her that the matter had been forwarded to DOP/UNDP "for review and possible investigation."

On 5 May 1995, the Applicant informed the Resident Representative, Addis Ababa, that contrary to the information on her "Certificate of Annual Leave Balance", she had an annual leave balance of 48.5 days as at the end of September 1993, for which she should have been compensated upon her separation from UNDP. She further stated as

follows: "Since all other separated UNDP staff were paid for 60 days annual leave upon separation from UNDP, I should be entitled to the same benefit. I have taken up this case with a lawyer in New York, including my termination from UNDP before the expiry of my contract, and pending the outcome of the case, I am signing the 'Certificate of Annual Leave Balance' under protest."

On 9 June 1995, the Representative of the Secretary-General informed the JAB that UNDP was seeking to resolve the matter but that if no resolution was reached, the Respondent would submit a reply to the Applicant's appeal. On 30 April 1996, the Respondent submitted his reply.

The JAB adopted its report on 14 April 1997. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

...

61. The Panel unanimously agreed [that] the Appellant did not discharge the burden of showing, by evidence, that the Letter of No Contest was signed by her under pressure, or that she was misled by UNDP.

62. The Panel unanimously agreed that the granting of SLWFP status to a staff member is not a right but one solely within the discretion of the Secretary-General, and that the decision not to grant the Appellant SLWFP status in August and September 1993 while she pursued the French Language Intensive Course at Grenoble, France, was a legitimate exercise of the discretionary power of the Secretary-General.

63. The Panel unanimously agreed that the Appellant was not entitled to have her accrued annual leave of 48.5 days, at the start of her SLWFP status on 1 October 1993, commuted to cash.

64. The Panel unanimously agreed that the Respondent, having agreed that it was proper for the Appellant to accept employment with UNFPA while on SLWFP status with UNDP, is estopped from repudiating his own acts. The Panel unanimously recommends, therefore, that the Respondent reimburse the Appellant

whatever amounts were recovered from her representing remuneration for services which she rendered to UNFPA.

65. The Panel unanimously agreed to make no further recommendation in support of the appeal."

On 27 June 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has considered your case in the light of the Board's report. He has taken note of the Board's unanimous conclusions that your appeal was receivable; that you did not discharge the burden of showing by evidence that the Letter of No Contest was signed by you under pressure or that you were misled by UNDP; that the granting of special leave with full pay (SLWFP) to a staff member is not a right but one solely within the discretion of the Secretary-General, and that the decision not to grant SLWFP status in August and September 1993 while you pursued the French Language Intensive Course at Grenoble, France, was a legitimate exercise of the discretionary power of the Secretary-General; that you were not entitled to have your accrued annual leave of 48.5 days, at the start of your SLWFP status on 1 October 1993, commuted to cash; that UNDP, having agreed that it was proper for you to accept employment with UNFPA while on SLWFP status with UNDP, is estopped from repudiating [its] own acts.

The Secretary-General has taken note of the Board's recommendation that UNDP reimburse you whatever amounts were recovered from you representing remuneration for services which you rendered to UNFPA. He has also taken note of the Board's determination to make no further recommendation in support of your appeal. The Secretary-General has decided to accept the Board's conclusions and recommendations. He has, however, been informed that UNDP has, in the meantime, decided to reimburse you, with interest, the amounts recovered for services you rendered to UNFPA. The relevant recommendation of the JAB having thus been rendered moot, the Secretary-General has decided to take no further action in regard to your case."

On 23 February 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the Staff Rules by failing to make a good faith effort to find an alternative post for the Applicant, who had been a permanent contract holder.

2. The Applicant was a victim of discriminatory and bad faith treatment by the Respondent. Although she was told that all FSL posts were being abolished, FSL posts have been maintained in other duty stations.

3. The Applicant signed the "Letter of No Contest" under duress, and therefore the Respondent is estopped from relying on that document.

Whereas the Respondent's principal contentions are:

1. The appeal is not receivable since the Applicant agreed, by Letter of No Contest dated 18 June 1993, not to contest the termination of her appointment, including the terms thereof, and the Respondent has fully met the terms set forth in the offer of agreed termination dated 4 May 1993.

2. The Respondent's refusal to grant SLWFP for study purposes was a valid exercise of the Respondent's discretion and in no way infringed any contractual right of the Applicant.

3. The Applicant was not entitled, at the start of her period of SLWFP, to the commutation of the annual leave that she had used for the period of study in France.

The Tribunal, having deliberated from 9 to 20 November 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 27 June 1997. That decision adopted a unanimous Joint Appeals Board (JAB) recommendation that, inter

alia, rejected the Applicant's claim that she had signed a "Letter of No Contest" under pressure and that she had been misled by the United Nations Development Programme (UNDP). The Respondent also agreed with the JAB's finding that the granting of special leave with full pay (SLWFP) to a staff member is not a right but is solely within the discretion of the Secretary-General and that the decision not to grant the Applicant SLWFP status while she pursued a French language course was a legitimate exercise of the discretionary power of the Secretary-General.

II. A number of preliminary questions are before the Tribunal. The first is whether the application is receivable in the light of the "Letter of No Contest" signed by the Applicant. The existence of a "Letter of No Contest" does not preclude the Tribunal from receiving an application. In this case, the Tribunal considers that the application is receivable. It finds that it is competent to hear and pass judgement upon the present application under article 2 of its Statute. Because the record of the case is sufficiently complete, there is no need for the Tribunal to conduct an oral hearing.

III. The Tribunal examined the question whether the Applicant signed the "Letter of No Contest" under duress, thereby rendering it invalid. In a letter dated 4 May 1993, the Director, Human Resources Planning and Change Management, informed the Applicant of the three options available to her: reassignment to another field post, conversion of her contract to a local appointment if a post were available, or early retirement based on a separation package. The Applicant chose the last option. On 18 June 1993, she signed a "Letter of No Contest". The Applicant alleges that she signed the letter under pressure and under the mistaken belief that all FSL posts had been abolished. The burden of providing evidence of duress is on the Applicant. In her appeal, she has failed to furnish the Tribunal with such evidence. The Tribunal cannot find in her favour on this point.

IV. Concerning the status of permanent staff members, staff rule 109.1(c) provides in part:

> "(i) ... if the necessities of the service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments ..., provided that due regard shall be had in all cases to relative competence, to integrity, and to length of service. ..."

This rule has been interpreted to mean that a good faith effort must be made by the Organization to find alternative posts for permanent appointment staff members whose posts are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination (cf. Judgement No. 85, Carson (1962)). The Tribunal has held in the past that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given (cf. Judgement No. 447, Abbas (1989)).

VI. In Judgement No. 679, Fagan (1994), paragraph XIII, the Tribunal addressed the importance of respecting the rights of permanent staff as set forth in staff rule 109.1 (c):

> "The Tribunal has referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation."

Contrary to the Respondent's claim, in his letter dated 4 May 1993, that all FSL posts were to be abolished throughout UNDP, the records show that this was indeed not the case. In response to questions put by the Tribunal, the Respondent confirmed that no FSL posts were in existence in the UNFPA office in Addis Ababa. However, he admitted that such posts existed in Viet Nam and China in 1993. Given the Applicant's excellent performance over many years and her flexibility in terms of assignments, there was no reason which would justify her separation from service without any attempt by the Administration to examine alternative placement. The Respondent has not demonstrated to the Tribunal that he conducted a good faith search for an alternative post for the Applicant in accordancce with staff rule 109.1(c). In addition, since it appears that a number of FSL posts were still available at the time, the Applicant signed the "Letter of No Contest" under a mistaken belief that they were all being abolished. Accordingly, she is entitled to be compensated on that account.

VII. In her pleas, the Applicant asks the Tribunal to order her immediate reinstatement with international status for a period of not less than two years. As stated by the Respondent, the Applicant wants to "eat her cake and have it too". Under the separation agreement, which the Applicant accepted, she received 21 months of SLWFP and continued international status, entitling her to education grant and home leave. Having reaped the fruits of the separation agreement, she is now asking the Tribunal to order her reinstatement. The Tribunal rejects her claim. (Cf. Judgement No. 547, McFadden (1992)).

VIII. Further, the Applicant submits that the Respondent's refusal to grant her SLWFP for study purposes, as well as his refusal to commute her annual leave entitlement to cash at the commencement of her SLWFP, is arbitrary and capricious.

Under staff rule 105.2(a)(i):

> "Special leave may be granted for advanced study or research in the interest of the United Nations ... for such period as the Secretary-General may prescribe ... In exceptional cases, the Secretary-General may, at his initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization."

The above provision makes it clear that the grant of SLWFP is discretionary, that exceptional circumstances are required to justify such grant, and that it must be "in the interest of the Organization". The governing principle is that the Secretary-General's discretionary authority is not absolute but must function within the requirements of due process and the pertinent rules and regulations (cf. Judgement No. 388, Moser (1987), para. II). This discretionary authority may be subject to review if it is shown to be based on lack of due process or mistake of fact, or that it is arbitrary or motivated by prejudice or other extraneous factors (cf. Judgements No. 309, De Shields (1983) and No. 515, Khan (1991), para. II). The Tribunal does not find any evidence of arbitrariness in the Secretary-General's decision to refuse to grant the Applicant special leave and therefore will not interfere with the exercise of his discretionary power. Moreover, at the end of her 21 months of SLWFP, the Applicant's Certificate of Annual Leave Balance showed a total of 60 days, and pursuant to staff rule 109.8, this is the maximum days of leave which can be commuted into cash upon separation. Therefore, the Tribunal agrees with the Respondent that the Applicant was in no way injured by this decision.

IX. By the date of her separation from service, the Applicant had 48.5 days of accrued annual leave. The Applicant had requested that the months of August and September 1993, when she attended a French language training programme in France, be considered SLWFP, but her request was denied. The Respondent instead required her to use her accrued annual leave entitlement to cover her absence during that period. Thus, 41 days were deducted from her accrued annual leave prior to her separation from service on 30 September 1993, leaving a balance of 7.5 days of accrued annual leave. The Applicant

argues that all the other staff members who accepted the same separation package as she were granted compensation for 60 days of annual leave at the commencement of the agreed-upon SLWFP period, in addition to payments made for accrued annual leave at the end of such period. She contends that she is entitled to the same treatment. The Applicant admits that she received payment for 60 days accrued annual leave at the end of the 21-month period. The Tribunal understands that this includes the balance of 7.5 days of accrued annual leave.

X. For the reason stated in paragraph VI, the Tribunal orders the Respondent to pay the Applicant compensation in the amount of three months net base salary, at the rate in effect on the date of her separation.

XI. For the foregoing reasons, the Tribunal rejects the remainder of the Applicant's pleas, as well as her request for costs.

(Signatures)

Mayer GABAY
Vice-President, presiding

Julio BARBOZA
Member

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary